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No. 96-1768

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

C. ELVIN FELTNER, JR.,

Petitioner,

v.

COLUMBIA PICTURES TELEVISION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

JOHN G. ROBERTS, JR.*
JONATHAN S. FRANKLIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5810
Counsel for Petitioner

* Counsel of Record

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TABLE OF AUTHORITIES

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REPLY BRIEF FOR PETITIONER

In its opposition brief, respondent Columbia Pictures Television, Inc. ("Columbia") does not dispute the existence of an irreconcilable conflict among the circuit courts on the question presented. Nor does it dispute that the question was squarely raised and decided in this case, both by the District Court and the Court of Appeals. Instead, Columbia attempts to argue the merits of the issue at this preliminary stage, and hypothesizes that a jury trial (which it fought hard to avoid below) would have produced precisely the same result as the bench trial that was held in this case. As shown below, neither of these contentions should prevent the Court from granting certiorari to resolve this extraordinarily widespread conflict over a constitutional issue of undeniable importance.

1. While conceding the existence of a conflict, Columbia attempts to downplay it by asserting that the decision below is in accord with the holdings of the "vast majority" of circuit courts. *See* Opp. 1, 6. But as explained in our petition, three of the eight circuit courts to have addressed the issue have held that the Seventh Amendment guarantees a jury trial on issues relating to the imposition of statutory damages, while five have reached the opposite conclusion. *See* Pet. 8-16.[1] Five out of eight courts (including the Eleventh Circuit, which was bound by the decision of the former Fifth Circuit) is certainly not a "vast majority," and the Court has previously granted certiorari on Seventh Amendment issues to resolve conflicts that were significantly less widespread. *See id.* at 19. The conflict, moreover, has only been deepening, given that the two most recent circuit court decisions prior to this case—*Cass County Music Co.* v. *C.H.L.R., Inc.*, 88 F.3d 635 (8th Cir. 1996), and *Video Views*, *supra*—upheld a Seventh Amendment right.[2]

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[1] It is simply not true, as Columbia contends (*see* Opp. 9), that the decision below is consistent with the Seventh Circuit's decision in *Video Views, Inc.* v. *Studio 21, Ltd.*, 925 F.2d 1010 (7th Cir.), *cert. denied*, 502 U.S. 861 (1991). In that case, as Columbia notes, the court held that "the Seventh Amendment requires jury determination of * * * willfulness." Opp. 9. Here, by contrast, the courts below rejected Feltner's contention that he was entitled to a jury trial on the question of willfulness, and willfulness was a principal subject of the bench trial held before the District Court over Feltner's objection. *See* Pet. App. 11a, 12a-13a; Transcript of March 15-16, 1994 Trial ("Tr.") at 7 ("The only issues to be tried in this case, as the court understands, is how many infringements were involved, and were they willful, and what should the damages be.").

[2] It is telling that the decision which Columbia believes contains the "most thorough explanation" of the issue is a *district court* ruling, *Raydiola Music* v. *Revelation Rob, Inc.*, 729 F. Supp. 369 (D. Del. 1990). *See* Opp. 7. That is because none of the five circuit court decisions adopting Columbia's position—in contrast to the three circuit court decisions going the other way—engaged in any appreciable analysis of the issue. *See* Pet. 23 n.16.

Because the conflict is so clear and persistent, Columbia is reduced to arguing against certiorari on the ground that the federal circuit courts adopting Feltner's view are simply wrong. Such an argument only underscores the need for this Court's review. For however the Court may ultimately resolve the issue, there is no question that the issue has sharply divided the lower courts, and that only this Court can resolve the constitutional dispute. Indeed, the need for such review is amply shown by Columbia's curious suggestion that the conflict undeniably posed by the decisions of the Fourth and Eighth (and, we would add, the Seventh) Circuits "would be better addressed on appeal of one of their decisions." Opp. 9. Regardless of whether Feltner's or Columbia's view on the merits is correct, if certiorari is not granted in this case the Seventh Amendment will continue to mean one thing in the Fourth and Eighth Circuits, another in the First, Second, Fifth, Ninth, and Eleventh, and yet another in the Seventh. This Court should not allow that situation to persist any longer.

2. In any event, the fact that several circuit courts have so recently found a Seventh Amendment right to have a jury decide questions relating to the imposition of statutory damages also belies Columbia's suggestion (*see* Opp. 8-9) that such a holding is precluded by a simple application of this Court's decisions in *Douglas* v. *Cunningham*, 294 U.S. 207 (1935), and *F.W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228 (1952). As Columbia concedes, the Court was not even presented with a Seventh Amendment question in those cases. *See* Opp. 9; *see also Cass County*, 88 F.3d at 642 n.4, 643 n.5 (references in *Douglas* and *F.W. Woolworth* to the trial judge assessing statutory damages were dicta). In fact, none of the circuits *denying* a Seventh Amendment right in copyright statutory damages cases since 1957 have relied on those cases, while the Eighth Circuit in *Cass County* very recently relied on *F.W. Woolworth* to reach the *opposite* conclusion. *See Cass County*, 88 F.3d at 643 (relying on fact that statutory damages are in part " 'designed to discourage wrongful conduct' "—a prototypical legal remedy) (quoting *F.W. Woolworth*, 344 U.S. at 233).

The notion that this Court need not resolve a sharp conflict among eight circuits on a recurring constitutional issue arising from a federal statute because the circuits agreeing with petitioner's position allegedly overlooked a 62-year old and a 45-year old decision—when those decisions did not even present that issue and were not even cited by the four most recent circuit court opinions *agreeing* with respondent—should not be seriously entertained.

Nor is it true, as Columbia claims (*see* Opp. 11-12), that the resolution of this issue is preordained by this Court's decision in *Tull* v. *United States*, 481 U.S. 412, 422 (1987). In fact, Columbia never even cited *Tull* in its brief before the Court of Appeals—a curious omission if *Tull* were so controlling on the question presented. And contrary to Columbia's assertion that the Eighth Circuit in *Cass County* "disregarded" *Tull*, Opp. 11, the Eighth Circuit was fully aware of, and specifically relied on, that decision. *See Cass County*, 88 F.3d at 643. It is not surprising, moreover, that the Eighth Circuit did not find *Tull* in any way inconsistent with the position Feltner advocates here. *Tull* involved civil penalties paid to the government, while this case involves amounts paid to a prevailing party "instead of actual damages and profits," 17 U.S.C. § 504(c)(1), in large part to compensate that party for infringement of a legal property right. In any event, Columbia's contention that the Eighth Circuit misunderstood *Tull*—which we dispute—is an argument *in favor of*, not against, granting certiorari to resolve the current conflict.

In arguing the merits of the issue, Columbia relies almost exclusively on the fact that the statute allows for discretion in deciding the amount of statutory damages. *See* Opp. 7-9. Yet as the Fourth and Eighth Circuits have held, that fact is not dispositive of the Seventh Amendment issue, as juries are routinely called upon to exercise discretion in imposing legal remedies, including punitive damages. *See Cass County*, 88 F.3d at 643; *Gnossos Music* v. *Mitken, Inc.*, 653 F.2d 117, 120-121 (4th Cir. 1981). In fact, as those courts have held, all of the factors this Court has relied on in applying the

Seventh Amendment—historical practice, the nature of the remedy, and the practical abilities of juries—lead to the conclusion that there is a constitutional right to have a jury decide all issues relating to the imposition of statutory damages under the Copyright Act.

But more importantly at this stage of the proceeding, it is clear—and Columbia does not dispute—that the lower courts to have considered the issue all relied on the same factors and precedents to reach starkly opposite conclusions. The conflict is therefore enduring and widespread, and this Court should resolve it now.

3. Columbia also suggests that the Seventh Amendment issue is not presented in this case because precisely the same result would have occurred regardless of whether Feltner was improperly denied his constitutional right to a jury trial. The simple answer to this contention is that neither the District Court nor the Court of Appeals held that the jury trial issue was irrelevant. Rather, both courts expressly considered and ruled upon the issue on the merits. *See* Pet. App. 10a-12a, 24a. The issue, therefore, is properly before this Court. Indeed, it is interesting that Columbia—after strenuously opposing Feltner's demand for a jury below—now asserts to this Court that the issue has no bearing on the case.

Contrary to Columbia's assertions, the courts below did not rule upon the questions of willfulness and the amount of statutory damages as a matter of law. Columbia did not even move for summary judgment on either of those issues, and the District Court rendered its findings on them only after a full bench trial. Thus, on the issue of willfulness, the Court of Appeals held only that "we cannot say that the district court's finding was clearly erroneous," Pet. App. 13a—precisely the standard used to review contested findings of *fact*, not determinations of law.

Columbia speculates that, if Feltner's request for a jury had not been denied, Columbia would have been granted a directed verdict on the issue of willfulness. *See* Opp. 16. This speculation is groundless. Whether an infringement was

willful is a question of fact. *See, e.g.*, *Lipton* v. *The Nature Co.*, 71 F.3d 464, 472 (2d Cir. 1995); *Video Views*, 925 F.2d at 1021 ("The determination whether a particular infringer acted willfully is left to the trier of fact * * * ."). Particularly given that Columbia—well-represented throughout these proceedings—never asked for (let alone received) judgment as a matter of law on that issue, such unfounded speculation can hardly prevent the Court from reaching the Seventh Amendment issue that both the District Court and the Court of Appeals recognized they had to decide below.

At trial, Feltner presented testimony that he believed reasonably and in good faith that the station's licenses had not been validly terminated, and that Columbia was continuing to negotiate over their terms. This belief was based on, among other things, Feltner's extensive experience in the industry that license termination notices of the type sent by Columbia were simply collection tactics, Columbia's continued negotiations, continued sales calls, and extension of contracts following such notices, and Feltner's defenses and counterclaims alleging that no infringement had occurred. *See, e.g.*, Tr. at 80-84, 86-88, 91, 95, 121, 123, 126, 199-201, 219, 233-234. Although the District Court believed the evidence at trial supported a finding of willfulness, there is no basis on this record for presuming that the District Court would have prevented a jury from hearing that evidence, or that a jury would have seen that evidence precisely the same way. The possibility that judges and juries might reach different results on the evidence presented is of course one reason the Seventh Amendment protects the right to trial by jury.

There is likewise no question that issues relating to the amount of statutory damages were not decided in this case as a matter of law. Given the discretion that the finder of fact exercises in determining the amount of such damages, it is simply impossible for that question to be determined as a matter of law where, as here, the plaintiff seeks more than the minimum amount. *See, e.g.*, *Fitzgerald Pub. Co.* v. *Baylor Pub. Co.*, 807 F.2d 1110, 1117 (2d Cir. 1986) (factors bearing on the amount of statutory damages include the

amount lost by the owner, the profit earned by the infringer, whether the infringer acted willfully, and deterrent effect). In addition to contesting willfulness, Feltner presented other evidence bearing on the proper amount, including evidence that the stations actually *lost* money by airing the television shows in question and that Columbia was unable to relicense them in the same markets.[3] Contrary to Columbia's contention that Feltner submitted "no admissible evidence" on these issues, Opp. 18 n.16, none of the testimony on these points was deemed inadmissible by the District Court. *See* Tr. at 84, 89-90, 127, 130-131, 186, 222.[4]

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[3] Moreover, if this case were tried to a jury, that jury would plainly find it relevant that Columbia, in bankruptcy proceedings involving the stations controlled by Feltner, recovered the full amount owed under the license agreements at issue—more than $3,000,000—plus nearly $500,000 in copyright claims against the stations. *See* Disbursing Agent's Amended Report of Distribution, *Krypton Broadcasting of Jacksonville, Inc.*, Nos. 93-31536-BKC-RAM and 93-31533-BKC-RAM (Bankr. S.D. Fla. filed Jan. 24, 1996). Thus, the jury could reasonably conclude that anything more than the minimum amount of statutory damages in this case would an undeserved windfall for Columbia.

[4] As for the issues relating to the number of infringements, it likewise appears that the Court of Appeals considered them to be questions of fact. The District Court, in its judgment after trial, made findings that "each episode constitutes a separate work for purposes of computing statutory copyright damages" and that the same episodes broadcast by different stations controlled by Feltner were separate acts of infringement. Pet. App. 22a. As to the latter finding, the Court of Appeals held that Feltner had "failed to demonstrate that the finding was erroneous," *id.* at 15a, rejecting Feltner's contention that a contrary finding should have followed from admissions made by Columbia in its complaint. And as to the finding that each episode was a separate work, the Court of Appeals stated the legal standard as whether each episode " 'has an independent economic value' " and could " 'live [its] own copyright life.' " Pet. App. 16a (citations omitted). The court then affirmed the District Court's findings on these questions, holding that the "evidence support[ed]" the District Court's conclusions. Pet. App. 17a. In *Gamma Audio & Video, Inc.* v. *Ean-Chea*, 11 F.3d 1106 (1st Cir. 1993), relied on by the Court of Appeals for the legal standard governing this issue (*see* Pet. App. 16a), the First Circuit explained that whether a television episode was a

4. Finally, Columbia asserts without any support that resolution of the Seventh Amendment issue "would have a negligible impact on future cases * * * ." Opp. 1. That is simply not so. As shown in our petition, the question arises repeatedly, it has been recognized as important by courts and commentators, and the lower courts have already applied their conflicting Copyright Act holdings to other statutes containing similar provisions. *See* Pet. 19-20. This Court has explained in rule (S. Ct. Rule 10(a)) and precedent (*Braxton* v. *United States*, 500 U.S. 344, 347 (1991)) that the principal purpose of this Court's certiorari jurisdiction is to resolve circuit conflicts. Here the circuit courts themselves have expressly acknowledged the sharp conflict on the question presented, as have the district courts and commentators. *See* Pet. 14-16. The need to resolve the conflict is heightened by the fact that it involves one of the basic protections of the Bill of Rights, and arises from a routinely-invoked federal statute in an area of exclusive federal jurisdiction. The constitutional question is one of fundamental and widespread importance. It should be decided by this Court.

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single work was a "mixed question of law and fact" because the district court in that case had applied the wrong legal standard. 11 F.3d at 1115-16. In this case, the District Court applied the correct legal standard, and its decision on that issue was therefore a pure factual question that should have been decided by a jury.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition, the petition should be granted.

Respectfully submitted,

JOHN G. ROBERTS, JR.*
JONATHAN S. FRANKLIN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-5810

* Counsel of Record

Counsel for Petitioner